Office-Supreme Court, U.S.
FILED
JUN 23 1983
ALEXANDER L. STEVAS,
CLERK

82-2116

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

On Appeal from a Judgment of the Court of Appeal of the State of California in Case No. A020025 (California Workers' Compensation Appeals Board Case Nos. 76 SAL 8071 and 77 SAL 9360)

APPELLANT'S JURISDICTIONAL STATEMENT

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
Counsel of Record
LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
1925 Century Park East
Suite 850
Los Angeles, CA 90067
(213) 553-0308
Attorneys for Appellant

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented

1. Does federal law invalidate a state statute which, as applied, disregards a dispositive factual finding previously rendered in arbitration proceedings under a collective bargaining agreement?

2. Does federal law preempt a state statute which, as applied, nullifies the results of collective bargaining by refusing to honor a prior and valid arbitration decision?

3. Does federal law preempt a state workers' compensation statute which, as applied, imposes criminal and civil liability on an employer for conduct which the National Labor Relations Board, but not the Federal Courts of Appeals, would deem prohibited or protected by the National Labor Relations Act?

4. Did the Supreme Court of California deny Appellant the due process guaranteed by the Fourteenth Amendment to the United States Constitution when it reversed a lower court's decision without permitting Appellant to oppose the appeal?

TABLE OF CONTENTS

Page

Questions Presented i

I

Jurisdiction 1

II

Constitutional Provisions and Laws Involved 3

A. United States Constitution, Article VI, Section 2 3

B. United States Constitution, Amendment XIV, Section 1 3

C. California Labor Code, Section 132a 3

III

Statement of the Case 4

IV

The Questions Are Substantial 19

A. Federal Law Requires that the Arbitration Award Be Given Preclusive Effect in the Subsequent Section 132a Proceedings 19

B. Preemption to Prevent State-Law Nullification of the Results of Collective Bargaining 24

C. Preemption by the National Labor Relations Act 27

D. The California Supreme Court Violated Appellant's Right to Due Process 29

V.

Conclusion 30

TABLE OF AUTHORITIES

Cases	Page
Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974)	20, 22, 23, 24
American Postal Workers v. United States Postal Service, 682 F.2d 1280 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3611 (1983)	22
Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981)	20, 22, 23, 24
Becton v. Detroit Terminal of Consolidated Freightways, 490 F.Supp. 464 (E.D. Mich. 1980), modified, 687 F.2d 140 (6th Cir. 1982)	22
Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313 (1971)	21
Cardinale v. Louisiana, 394 U.S. 437 (1969)	2
Chambers v. Mississippi, 410 U.S. 284 (1973)	2
De Coult v. Beckman Instruments, Inc. (1973), 38 CCC 383	16
Farrens Tree Surgeons, Inc., 264 N.L.R.B. No. 90 (September 30, 1982)	18, 27
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	20
Flournoy v. Wiener, 321 U.S. 253 (1944)	1
General Drivers Local 89 v. Riss & Co., 372 U.S. 517 (1963)	25
Gouveia v. Napili-Kai Ltd., 97 Lab. Cases (CCH) ¶ 10,005 (Hawaii 1982)	25
Grumman Flexible Corporation, 264 N.L.R.B. No. 34 (September 28, 1982)	18, 27
Hansberry v. Lee, 311 U.S. 32 (1940)	21
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)	21

Page

Ivery v. United States, 686 F.2d 410 (6th Cir. 1982), cert. denied, 51 U.S.L.W. 3684 (1983) 19

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 2

Judson Steel v. Workers Compensation Appeals Board, 22 Cal.3d 658, 150 Cal.Rptr. 250 (1979) 11, 12, 14

Kremer v. Chemical Construction Corp., 72 L.Ed.2d 262 (1982) 24

Krispy-Kreme Doughnut Corp., 245 N.L.R.B. 1053 (1979), enforcement denied, 635 F.2d 304 (4th Cir. 1980) 27, 28

Lambert v. California, 355 U.S. 225 (1957) 29

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) 19

Local 926, International Union of Operating Engineers v. Jones, 51 U.S.L.W. 4343 (1983) 25, 27

Machinists Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) 24

Mathews v. Eldridge, 424 U.S. 319 (1976) 29

Montana v. United States, 440 U.S. 147 (1979) 1, 20

Ohio Brass Company, 261 N.L.R.B. No. 18 (April 13, 1982) 18, 27, 28

Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322 (1979) 20

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981) 22, 23, 25, 28

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 2

Page

Republic Steel v. Maddox, 379 U.S. 650 (1965) 21

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 2

Rinaldi v. Yeager, 384 U.S. 305 (1966) 29

San Diego Bldg. Trades v. Garmon, 359 U.S. 236 (1959) 27

Spainhouer v. Western Electric Company, Inc., 615 S.W.2d 190 (Texas 1981) 26

Teamsters Local 20 v. Morton, 377 U.S. 252 (1964) 24

Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959) 24, 25

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 19

Thompson v. Monsanto Company, 559 S.W.2d 873 (Tex. Civ. App. 1977) 25, 26

Twining v. New Jersey, 211 U.S. 78 (1908) 29

United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) 20

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 19

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 19

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 19, 25

Vaca v. Sipes, 386 U.S. 171 (1967) 20

Vaughn v. Pacific Northwest Bell Telephone Co., 611 P.2d 281 (Oregon 1980) 25

Western Electric Co. v. Workers' Compensation Appeals Board, 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979) 10, 13, 14, 29

Page

Constitution

United States Constitution, Art. VI, Sec. 2 3

United States Constitution, Fourteenth Amendment ..... i, 21

United States Constitution, Fourteenth Amendment, Sec. 1 3

Rules

Rules of the Supreme Court of the United States, Rule 10.4 1

Rules of the Supreme Court of the United States, Rule 15.1(b) 1

Rules of the Supreme Court of the United States, Rule 17.1(b) 26

Rules of the Supreme Court of the United States, Rule 28.1 1

Rules of the Supreme Court of the United States, Rule 28.4(c) 1

Statutes

California Labor Code Section 132a ..... *passim*

California Labor Code, Sec. 132a(1) 26

National Labor Relations Act, Sec. 7 (29 U.S.C. § 157) 18

National Labor Relations Act, Sec. 8(a)(1) (29 U.S.C. § 158(a)(1)) 18, 27

Texas Revised Civil Statutes, Art. 8307c, Sec. 1 26

United States Code, Title 28, Sec. 1257(2) 1, 2

United States Code, Title 28, Sec. 1257(3) 1, 2

United States Code, Title 28, Sec. 2101(c) 1

United States Code, Title 28, Sec. 2103 1

United States Code, Title 28, Sec. 2403(b) 1

Page

United States Code, Title 29, Sec. 173(d) 19

United States Code, Title 29, Sec. 201 et seq. 22

United States Code, Title 42, Sec. 2000e et seq. 22

Other Authorities

Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976) 19

Restatement (Second) of Judgments, Sec. 83(2) 21

Restatement (Second) of Judgments, Sec. 84(3) 21

No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

APPELLANT'S JURISDICTIONAL STATEMENT

I
JURISDICTION

Dalgety Foods, Inc. ("Appellant") appeals from the California Court of Appeal's denial of Appellant's petition for writ of review with respect to an order of the California Workers' Compensation Appeals Board ("Appeals Board") holding that Appellant violated California Labor Code Section 132a ("Section 132a") by discharging Angelina Avina ("Appellee").[1] The Court of Appeal's order was filed on January 10, 1983.[2] The California Supreme Court denied Appellant's petition for a hearing on February 9, 1983. On April 27, 1983, Appellant filed a notice of appeal with both the California Court of Appeal and the California Workers' Compensation Appeals Board. On April 29, 1983, the Honorable Justice William H. Rehnquist extended the time for docketing this appeal to and including June 23, 1983.

Jurisdiction of this appeal is grounded on 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257(2).[3] Appellate jurisdiction

---

[1]Pursuant to this Court's Rule 28.1, Appellant states that it has no affiliates or subsidiaries that are not wholly owned; Appellant is itself wholly owned by Dalgety PLC (U.K.). Because this Court in another context has noted the identity of a non-party source of financing for litigation, *see Montana v. United States*, 440 U.S. 147, 151, 154 (1979), Appellant wishes to advise the Court that it brings this appeal with financial assistance from The Pacific Telephone and Telegraph Company, which possesses no control over the conduct of this litigation but has expressed an interest in the outcome of the appeal.

Pursuant to this Court's Rule 15.1(b), Appellant states that the following were parties below: Appellant, Appellee, the California Workers' Compensation Appeals Board, the Hartford Accident and Indemnity Company, the Mission Insurance Company, and the State Compensation Insurance Fund. Appellant notified the Clerk by letter dated April 27, 1983 that it believes that, of the parties below, only Appellant and Appellee retain an interest in the outcome of this appeal. *See* Supreme Court Rule 10.4.

Pursuant to Rule 28.4(c) of this Court, Appellant states that 28 U.S.C. § 2403(b) may be applicable and that this document has been served upon the Attorney General of the State of California.

[2]*See* 48 Cal. Comp. Cases 25 (1983).

[3]Appellant's fourth question, whether the California Supreme Court violated Appellant's right to due process, does not satisfy the jurisdictional prerequisites for a direct appeal. Appellant asks this Court to accept review of that question as if it were presented in a petition for certiorari under 28 U.S.C. § 1257(3). *See Flournoy v. Wiener*, 321 U.S. 253 (1944); *cf.* 28 U.S.C. § 2103 (improvident appeal to be treated as petition for certiorari).

lies under 28 U.S.C. § 1257(2) where a state court holds a state statute "applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1979); *see, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 79-80 (1980). The federal challenge must explicitly address a specific state statute, *e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n.4 (1980), so that the state courts have a proper record and a fair opportunity to reconcile the statute with the claim of invalidity, *see Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

The present appeal easily meets both the terms and the aims of 28 U.S.C. § 1257(2). Appellant argued throughout the Section 132a proceedings below that, since a labor arbitrator had ruled that Appellant discharged Appellee solely because her continued employment presented a safety risk, *see* 6, *infra*, the doctrines of federal preemption and collateral estoppel blocked Appellee's Section 132a claim. At the trial level, the Workers' Compensation Judge explicitly acknowledged that Appellant challenged the constitutionality of Section 132a as applied. Appendix H at 175; *see* Appendices L at 222, CC at 392. The Appeals Board, too, recognized that Appellant claimed a conflict between Section 132a and federal law. Appendix DD at 401. Appellee herself founded her counter-argument on the constitutional relationship of the preemption and collateral estoppel defenses. Appendix M at 224, 233; *see* Appendix S at 367.

At no point below did any party, agency, judge, or court claim that Appellant's federal-law challenges had not properly been presented. Despite the state courts' failure expressly to address the issue, therefore, Appellant's preemption and collateral estoppel contentions are properly before this Court. *See Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973).

II
CONSTITUTIONAL PROVISIONS AND LAWS INVOLVED

A. United States Constitution, Article VI, Section 2.

This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States, shall be the Supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

B. United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

C. California Labor Code, Section 132a.

It is the declared policy of this State that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(2) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a

raise in premium or for any other reason, to discharge an employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553.

(3) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor, and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(4) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge or in any manner discriminate against an employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor.

Proceedings under this section for increased compensation as provided in Section 4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but such proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine a misdemeanor charge. The appeals board may refer and any worker may complain of suspected violations of criminal misdeameanor provisions of this section to the Division of Labor Standards Enforcement, or directly to the office of the public prosecutor.

III
STATEMENT OF THE CASE

Appellee once worked at Appellant's frozen-food manufacturing plant in Salinas, California. The terms of her employment were set forth in a collective bargaining agree-

ment between Appellant and Teamsters Local 890 ("Union"). Included among those terms were a mandatory grievance-arbitration procedure covering "any difference or issue between an employee or the Union and the Employer arising out of the application or interpretation of any provision of this Agreement", Appendix A at 26, a provision allowing discharge "for cause", *id* at 21, and a prohibition against discrimination based on "race, color, sex, religious creed, age, national origin, or handicap, as provided in the appropriate State and Federal laws", *id* at 3; *see id.* at 5.

On September 12, 1979, Appellant discharged Appellee. The written notice of termination informed Appellee that Appellant "deem[ed] it impossible to fulfill its obligation to protect you on the job and finds the burden of liability unreasonable, in view of your history of accidental injury on the job and in light of a sixty-two percent (62%) permanent disability award granted by the Workers' Compensation Appeals Board." *See* Appendix C at 105. Appellee challenged the discharge and ultimately pressed her grievance to arbitration.

At the arbitration hearing on October 26, 1979, battle was joined on two issues: Appellant's true motives and the existence of a safety risk. Appellant maintained that it had discharged Appellee solely because, as a result of her long history of industrial and non-industrial accidents, she labored under physical disabilities which made her continued employment unsafe both to herself and to her coworkers.[4] Appellee replied that the medical evidence showed that she was perfectly able to work and that the termination letter betrayed Appellant's real intention: to eliminate a potential

[4]The partial transcript of the arbitration hearing shows that Appellant articulated this position in its opening statement, *see* Appendix D at 109; Appellant's post-hearing brief expands on the theme, *see* Appendix F.

workers' compensation claimant.[5]

The parties were unable to agree upon a statement of the issues for arbitration which would reflect the substance of the dispute, *see* Appendix D at 109; they compromised with the factually neutral question "whether or not the grievant, in this case Angelina Avina, was discharged for cause within the meaning of the Collective Bargaining Agreement." *Id.* at 111.

The arbitrator took sworn testimony throughout the day, accepted post-hearing briefs in December 1979, and upheld the discharge in a decision issued on January 16, 1980, *see* Appendix G. The decision rested on two factual findings: (1) Appellant's sole reason for discharging Appellee was its concern about safety and (2) Appellee's continued employment would in fact have presented an undue safety risk.[6]

---

[5]The Union's opening remarks sketched these points, *see* Appendix D at 109-10; the post-hearing brief amplified them and explicitly characterized the discharge as unlawful discrimination:

> The company basis [sic] its sole position on the fact that [Appellee] has a possibility of becomming [sic] involved in a future workers' compensation claim by being somewhat more prone to injury in certain areas of her body due to her prior history of injury, than possibly other workers. This, in the Union's opinion, is not cause, just or otherwise, indeed, no cause at all, for termination. It is rather discrimination. In both instances Section 13 [just-cause provision] and Section 2 [antidiscrimination provision] of the contract are violated.

Appendix E at 117. Thus, Appellee argued to the arbitrator that the discharge constituted precisely the sort of discrimination prohibited by Section 132a.

[6]Appellee may now want to dispute that the arbitrator made these findings, but Appellee has surely waived the point. Appellant identified the arbitrator's factual findings at the trial level below and Appellee did not dispute the point then; Appellant consistently asserted the same position in the many subsequent briefs and petitions without drawing Appellee's objection. *Compare, e.g.* Appendix K at 196 (Appellant's first petition for reconsideration to the Appeals Board) *with* Appendix M (Appellee's answer to that petition); Appendix R at 299 (Appellant's opposition to Appellee's petition for writ of review to the Court of Appeal) *with* Appendix S (Appellee's reply brief). In fact, every brief filed by Appellant below repeated this contention, yet Appellee did not dispute it until her November 1982 brief in opposition to Appellant's last request for writ of review (from the denial of which Appellant takes this appeal). As Appellant pointed out in its December 1982 reply, that was too late to raise a completely new theory.

Appellee sought no judicial review.[7]

Four days *before* the arbitration hearing, Appellee filed civil and criminal claims under Section 132a, which prohibits employment discrimination in retaliation for an employee's having sought or received workers' compensation benefits.[8] At the Section 132a hearing held on February 5, 1981 before Workers' Compensation Judge William C. Butler, the parties adduced evidence virtually identical to that which had been presented at the arbitration. There were two salient exceptions: first, Appellant introduced the record of the arbitration; second, Appellee testified that on May 5, 1980 — some eight months after her discharge — she began

---

The arbitrator made no formal findings of fact. But the arbitrator's written opinion, in light of the evidence and argument submitted to him, strongly supports Appellant's position. As to Appellant's motive for discharging Appellee, the arbitrator wrote in part:

> The termination . . . followed the receipt of certain medical information by the Company, which, to them, seemed to indicate that her continued employment might represent a dangerous situation to her and, perhaps, to her fellow employees.

Appendix G at 158. Throughout his decision the arbitrator explored the extent to which a safety risk really existed, for example:

> Is the grievant motivated, or driven, by economic necessity, or by confidence in his [sic] physical ability to consistently perform the task at hand in an acceptable manner? The amount of the Workers' Compensation Award, the communications and testimony of Dr. Storey and the lawyer for Dr. Dohn served to indicate the severity of the injury to which they were addressing themselves. The history of other injuries served to emphasize the cumulative effect of these injuries, and taken in combination with the record, indicates a strong possibility of future injuries unless Ms. Avina conducts herself very, very carefully and does not get involved in a hazardous environment.

Id. at 161-162.

[7]In the arbitration, the parties enjoyed a full and fair opportunity and incentive to litigate. *See* Appendix G at 157. Appellee has never contended that the arbitration was not procedurally fair.

[8]The Section 132a claims were filed on Appellee's behalf by the same law firm which represented the Union in the arbitration proceeding. Both claims recited that a grievance had been filed and that Appellee had demanded reinstatement "through her union business representative". Appendices B at 95, C at 102. The criminal claim asked that "this matter be referred to the Division of Labor Standards and Enforcement for prosecution under the criminal misdemeanor provisions of Labor Code § 132a . . . ." Appendix C at 102.

working at a different food production plant and continued to work for several months with only one minor accident.

At the completion of Appellee's case in chief, Appellant made an oral motion to dismiss on several grounds. *See* Appendix H at 174-75. First, Appellant argued that, because Appellee had already unsuccessfully sought relief from the discharge through the collectively bargained arbitration process and had not appealed from the adverse arbitration decision, the Section 132a claim should be dismissed. Judge Butler responded that dismissal was inappropriate and that he was obliged to render a decision on the merits. Appellant next argued that the matter was preempted by federal law because the subject of the dispute had already been resolved through the collective bargaining process. Judge Butler denied the preemption defense without addressing its merits on the ground that "this Board, under the California State Constitution, cannot rule on the constitutionality of the acts vesting jurisdiction in the Board". *Id.* at 175. Appellant's third point was that the arbitration decision precluded the Section 132a claim. Judge Butler disagreed on the ground that the issues in the two proceedings were different. Finally, Appellant argued that the discrimination claim should be dismissed because the arbitrator's factual findings were collateral estoppel on the dispositive factual issues in the Section 132a proceedings. Judge Butler indicated that he was "concerned" about that possibility and would defer ruling on that motion. *Id.* at 175.

At the end of the Section 132a hearing, Judge Butler stated that he did not wish the parties to submit briefs. Appellant subsequently wrote a letter requesting him to reconsider and outlining the areas that Appellant wished to brief, including the preemption and collateral estoppel defenses. The request was not granted. *See* Appendix J at 186.

On March 3, 1981, Judge Butler ruled that Appellant had violated Section 132a by discharging Appellee. The decision rested on two factual findings: (1) Appellant's sole reason

for discharging Appellee was to avoid future injury to her or her coworkers, and thus Appellant had no discriminatory or unlawful motive, Appendix J at 186, but (2) Appellant was wrong to judge that Appellee's continued employment would present an undue safety risk, *id.* at 185. That is, Judge Butler agreed with the arbitrator as to Appellant's motives but disagreed about the safety risk, observing that Appellee "demonstrated by the fact of her return to work for several months [at a job similar to that which she had had with Appellant] that she was capable of performing her work." *Id.* Judge Butler ruled that, even though Appellant harbored no unlawful motive, Appellant's mistake about the safety risk brought the discharge within Section 132a's reach.

With regard to the preclusive effect of the arbitration award, Judge Butler ruled as follows:

> As to the impact of the grievance procedure and arbitration, the position of the Defendant that as to factual matters, the doctrine of collateral estoppel applies, they are correct, but as to the question of demonstration before the Board, that she could have returned to work and performed her job without risk of future injury or re-injury, that issue was not before the arbitrator. The only issue there was, was the determination of whether or not there was a violation of the collective bargaining agreement. There was found to be none.
>
> There was no determination made of whether or not the discharge was in violation of Labor Code 132(a) nor could there be.

Id. Judge Butler evidently found it unnecessary to distinguish between collateral estoppel and res judicata.

Appellant petitioned the Appeals Board for reconsideration on a number of grounds: that the absence of a discriminatory motive precluded a finding of discrimination, that Section 132a was preempted because of the arbitration award, that collateral estoppel and res judicata precluded Appellee's claim, and that Judge Butler improperly evaluated Appellee's ability to work safely on the basis of events

occurring long after the discharge.[9] Appendix K. Judge Butler filed an obligatory report and recommendation regarding Appellant's petition. Appendix L. In that report, Judge Butler discussed whether a discriminatory motive was necessary for a finding of violation and repeated his belief that he was jurisdictionally unable to rule on the preemption issue. Judge Butler also addressed the preclusion defenses, again without distinguishing between res judicata and collateral estoppel:

> With respect to the effect of the arbitration proceeding, and the assertion that res judicata applies, I believe petitioner is in error. First, the parties are not the same. The parties to an arbitration are the Union and the Employer. The employee is a beneficiary of such action but is not a party.
>
> Secondly, the issue before the arbitrator clearly differed from that before me. The contract was violated, if at all, at the time of the discharge. No question was before the arbitrator as to the applicants right, under "Western Electric" [*Western Electric Co. v. Workers' Compensation Appeals Board*, 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979)] to demonstrate after the fact, that she could do the work. The only apparent issue before the arbitrator was whether or not Dalgety discharged her for the reasons stated, and were those reasons valid under the contract with the Union.[10]
>
> Thirdly, the arbitration decision is not a decision of a Court of Record.

---

[9]Both Appellant and Judge Butler were surprised at how quickly Appellee recovered from purportedly permanent disabilities once she had settled her workers' compensation disability claim for some $22,000. *See* Appendix J at 187.

[10]Judge Butler attempts here to distinguish his issue from the arbitrator's. Apparently Judge Butler contends that the safety issue in the arbitration is different from the safety issue in the Section 132a proceedings because the hearings were held months apart and, by the time Judge Butler held *his* hearing, Appellee had shown she could in fact work safely. Thus Judge Butler would transform what is at most newly discovered evidence into a separate factual issue for purposes of the preclusion doctrines. Neither the Appeals Board nor the courts below adopted Judge Butler's view.

Appendix L at 221-22.

Appellee opposed Appellant's preemption and preclusion contentions with the following argument:

> Labor Code §132(a) sets forth a broad prohibition of discrimination against employees who have sustained industrial injuries. Section 132(a) is essential to the protection of injured workers and the integrity of the Workers' Compensation Act. *Judson Steel vs. WCAB, Maese*, (1978), 43 CCC 1205.
>
> The validity and constitutionality of the compensation act has long been established. *Western Ind. Co. vs. Pillsbury*, (1915) 170 C 686; *Nelson vs. Metalclad Insulation Corp.*, (1975), 44 Cal.App.3d 474; 81 Am.Jur.2d. *Workmen's Compensation*, § 10, et. seq. The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal pre-emption argument, nor are the cases cited by defendant on point. The *Oliver* [*Teamsters Local 24 v. Oliver*, 358 U.S. 283 (1959)] and *Morton* [*Teamsters Local 20 v. Morton*, 377 U.S. 252 (1964)] cases cited by the employer involved situations in which state law was being invoked to the unfair advantage of employers in an economic struggle against unions; there is nothing in those cases to even remotely suggest that federal law prohibits the states from protecting industrially injured individuals from discrimination.
>
> The gist of the employer's pre-emption argument — variously raised elsewhere in the petition under the labels "res judicata" and "collateral estoppel" — is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code § 132(a). However, the [California] Supreme Court clearly stated in *Judson Steel* [v. *Workers' Compensation Appeals Board*, 22 Cal. 3d 658, 150 Cal. Rptr. 250 (1979)] that compliance with a collective bargaining agreement is not a defense to 132(a):

> "[A]n employer may not defend a discriminatory employment practice proscribed by § 132(a), on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation laws than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination." *Judson Steel*, supra.

Appendix M at 232-33.

On May 29, 1981, the Appeals Board reversed Judge Butler's decision on the basis of the first defense, absence of discriminatory motive, without reaching the others:

> [T]he record reveals that the workers' compensation judge was convinced that, in effect, the "true reason" for the discharge was the employer's belief albeit possibly mistaken that re-injury or further injury would result from continued work. That being the case, a Labor Code Section 132a violation should not have been found.

Appendix N at 242.

Appellee petitioned for reconsideration of that decision, arguing that Section 132a was violated even though Appellant harbored no discriminatory motive. Appellee did not discuss the preemption, collateral estoppel, or res judicata defenses, presumably because the adverse decision of the Appeals Board had not addressed those issues. *See* Appendix O.

The Appeals Board refused reconsideration. Appendix P. Appellee petitioned the California Court of Appeal for a writ of review, again arguing that, because the Workers' Compensation Judge had found no safety risk, the discharge violated Section 132a. Appendix Q. Appellant answered that argument and added the preemption and collateral estoppel defenses arising from the arbitration award. Appen-

dix R.[11] In her reply brief, Appellee responded to these affirmative defenses with the same cursory remarks that she had made in her answer to Appellant's earlier, successful petition for reconsideration. *Compare* Appendix S at 367-69 *with* Appendix M at 232-33. The Court of Appeal denied Appellee's petition. Appendix T.

On December 2, 1981, Appellee petitioned the California Supreme Court for a hearing. Appendix MM. The Supreme Court reversed the Court of Appeal on December 23. Appendix U.[12] Obeying the Supreme Court's mandate, which cited *Western Electric Co. v. Workers' Compensation Appeals Board, supra*, the Court of Appeal issued a writ of review. Appendix W; *see also* Appendices V & X.

Relying on *Western Electric*, the Court of Appeal reversed the Workers' Compensation Appeals Board's decision favoring Appellant. In an unpublished opinion dated March 25, 1982, the Court of Appeal ruled that Appellant

---

[11]Appellant relegated its res judicata argument to a footnote, *id.* at 316 n.3, in the hope that the Court of Appeal, unlike the Workers' Compensation Judge, would not confuse res judicata with collateral estoppel and apply the wrong test. These preemption and preclusion arguments were probably unnecessary in view of the procedural posture of the case, but Appellant raised them anyway to forestall any subsequent argument that they had not been preserved.

[12]Appellant received no copy of Appellee's petition until after the California Supreme Court granted it. On December 18, 1981, Appellant's counsel accidentally learned from the Workers' Compensation Judge that the petition had been filed. He asked Appellee's attorney to send a copy immediately and contacted the clerk of the California Supreme Court to request that the court delay its decision so as to allow time for Appellant to receive, review, and respond to Appellee's petition. Neither request met with success. After the California Supreme Court's adverse decision, Appellant petitioned for rehearing on the ground that it had been denied procedural due process inasmuch as it had not had an opportunity to respond to Appellee's petition. Appellant's attorney still had received no copy, but a clerk of the California Supreme Court read the contents of Appellee's petition over the telephone and Appellant's counsel prepared the petition for rehearing on the basis of that conversation. (This unpleasant story is told more fully in the petition for rehearing itself, Appendix NN hereto.) The California Supreme Court refused to accept Appellant's petition even for filing on the ground that, once it issued its mandate to the Court of Appeal, it lost jurisdiction over the matter.

had violated Section 132a because Appellee's continued employment presented no safety risk:

> We conclude that the [appeals] board has concentrated on one paragraph of the Western Electric case and ignored the paragraph which follows, which reads: "However, *if Smith can demonstrate she could have returned to work and performed her job without risk of reinjury or further injury to herself*, then the Board could properly draw an inference of prohibited discriminatory action by Western, unless Western can otherwise demonstrate to the contrary." (*Western Electric Co. v. Workers' Comp. Appeals Bd., supra*, p. 645; see also *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 665.)
>
> The rule of section 3202 that Workers' Compensation laws are to be construed " 'liberally . . . with the purpose of extending their benefits for the protection of persons injured in the course of their employment' " applies. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 668.) Although section 132a does not compel an employer to ignore the realities of doing business by "reemploying" unqualified employees or employees for whom positions are no longer available, petitioner [Appellee], by returning to work and working for over four months without further injury,[13] demonstrated that, despite her industrial injury, she remained competent to perform her job; and respondent employer did not demonstrate to the contrary.

Appendix Y at 384 (emphasis in original).

Thus, the factual issue of whether Appellee's continued employment presented a real safety risk — precisely the

---

[13]The return to work mentioned here is Appellee's brief stint as a lettuce trimmer at another food production company following some eight months of recuperation. What the Court of Appeal omits is that Appellee stopped working at that other employer when she suffered an industrial injury which temporarily disabled her. Appellee herself testified to these facts and Judge Butler specifically mentioned them in his report. *See* Appendix H at 173-74. The Court of Appeal somehow overlooked them.

issue which the arbitrator had resolved in Appellant's favor — was dispositive of the appeal.

Upon Appellant's petition for rehearing, the Court of Appeal modified its opinion by adding the following footnote to the end of the unpublished opinion:

> "In ruling upon a claim that an employer's conduct violated Section 132a, neither the board nor this court is bound by a decision of a labor arbitrator that the employer's conduct did not violate the Union contract. (See *Judson Steel Corp. v. Workers' Comp. Appeals Bd., supra*, p. 665, fn. 5.)"

Appendix Z.

The California Supreme Court denied Appellant's request for review, Appendix AA, and the case returned to the Appeals Board, which reinstated the Workers' Compensation Judge's decision, *see* Appendix BB. Appellant petitioned for reconsideration on the ground that, due to the procedural posture of the case, its preemption and collateral estoppel arguments had never been ruled on. In his report on Appellant's petition, the Workers' Compensation Judge agreed that "[t]he Petition goes to certain limited issues as to which there has been no judicial determination due to the procedural path and the limitation of review", Appendix CC at 392, and then analyzed the issues:

> The issue of federal pre-emption was raised in a timely manner and preserved. I specifically made no finding on this subject, believing it to be beyond the appropriate jurisdiction of the Board at trial level. It appears to have been raised and either not ruled on or mooted at each subsequent stage of the proceedings and has been briefed in full.
>
> The issue of collateral estoppel, I did resolve against Defendants on the following grounds:
>
> (a) non-identity of parties. The parties to an arbitration and grievance are the contracting parties, in this case, the union and the employer and the individual employee is not a party. (However, the "action" is

maintained for her benefit).

(b) Non-identity of issues, under the ruling of arbitrator, the good faith of Defendants at the time of the discharge was a defense.

(c) The ruling in Western Electric that applicant could show by subsequent events that there was no unreasonable risk of harm.

Id. at 392-93.[14]

The Appeals Board denied reconsideration, addressing the collateral estoppel and preemption defenses on the merits. Appendix DD. As to collateral estoppel, the Appeals Board adopted portions of the Workers' Compensation Judge's analysis, including his changes of position, his confusion between collateral estoppel and res judicata, and his misunderstanding of what issues were before the arbitrator, and concluded that:

> [T]he workers' compensation judge was justified in finding that at the time of the discharge there was work available which applicant could have performed without risk of either re-injury or further injury, and that the workers' compensation judge's determination to that effect was not collaterally estopped by reason of the arbitrator's previous determination (see *De Coult v. Beckman Instruments, Inc.* (1973), 38 CCC 383, 387-388).

---

[14]Judge Butler is wrong to characterize these as the grounds on which he resolved the collateral estoppel issue against Appellant. When he ruled on the issue, Judge Butler held that the doctrine of collateral estoppel *did* apply to the effect of the arbitration on the Section 132a proceedings. It was only because the arbitrator had not ruled on whether Section 132a (rather than the collective bargaining agreement) had been violated that Judge Butler found that the arbitration award did not bar the Section 132a suit. *See* 9, *supra*. Judge Butler therefore must be referring not to his original decision but instead to his subsequent report on Appellant's initial petition for reconsideration. *See* 10, *supra*. Even so, Judge Butler's summary is inaccurate: newly omitted is his remark about an arbitrator not being a "Court of Record"; newly included is the suggestion that he read the arbitrator's decision as holding that Appellant's good faith was a defense to the grievance. *Compare* 9, *supra*, *with* 10 *supra*.

Id. at 399.[15]

As to preemption, the Appeals Board stated:

We have reviewed the cases cited by petitioner in support of its preemption argument. We find these cases to be distinguishable from the matter herein. The Labor Code Section 132a prohibition of discrimination by reason of industrial injury is not in conflict with the National Labor Relations Act directive whereby resolution of discharge cases may be provided for by collective bargaining agreements. This is not a strike case, and our disposition need not address matters of union activity. Moreover, in the Answer (dated May 26, 1981) to defendant's earlier petition, applicant's attorney urged as follows:

". . . The power of the states to regulate and enact workers' compensation laws being well established, there is no merit to the employer's federal preemption argument, nor are the cases cited by defendant on point. . . .

". . . The gist of the employer's pre-emption argument — variously raised elsewhere in the petition under the labels 'res judicata' and 'collateral estoppel' — is that the employer's firing of Ms. Avina was not found to be violative of the collective bargaining agreement and therefore should not be found violative of Labor Code Section 132a. However, the Supreme Court clearly stated in *Judson Steel* that compliance with a collective bargaining agreement is not a defense to 132a:

" 'A employer may not defend a discriminatory employment practice, prescribed [sic] by Section 132a, on the basis of the provisions of a collective bargaining agreement, for a union may no more bargain

---

[15]Despite Judge Butler's earlier attempt to establish that he was obligated to evaluate the safety risk at the time of the Section 132a hearing, *see* note 10 and accompanying text, *supra*, the Appeals Board characterized Judge Butler's ruling as a determination of the safety risk "at the time of the discharge". *Id.*

> away its members' statutory rights against, for example, sexual or racial discrimination.' *Judson Steel, supra.*"

We agree with applicant's attorney. We are persuaded that defendant's preemption argument is without merit. *Id.* at 401-402.

Appellant unsuccessfully petitioned the Court of Appeal for a writ of review, *see* Appendix EE, and then petitioned the California Supreme Court for a hearing, *see* Appendix FF. In the latter petition, Appellant augmented its preemption defense by referring to three recent decisions of the National Labor Relations Board ("NLRB")[16] which suggested that, at least in the context of a collective bargaining relationship, actions which would violate a statute such as Section 132a might also violate Section 8(a)(1) of the National Labor Relations Act.[17] Shortly before Appellee filed an answer to the petition, *see* Appendix GG, the California Supreme Court asked Appellant's attorney for copies of the three new NLRB decisions, which Appellant provided. *See* Appendix HH. Despite this promising interest, on February 29, 1983 the California Supreme Court denied Appellant's request for a hearing. Appendix II.

---

[16] *Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90 (September 30, 1982); *Grumman Flexible Cororation*, 264 N.L.R.B. No. 34 (September 28, 1982); *Ohio Brass Company*, 261 N.L.R.B. No. 18 (April 13, 1982).

[17] Section 8(a)(1) of that Act provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7". 29 U.S.C. § 158(a)(1). Section 7 states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id. § 157.

Appellant filed its notice of appeal on April 27, 1983 with the Appeals Board and the California Court of Appeal. *See* Appendices JJ & KK. On April 29, the Honorable Justice William H. Rehnquist extended the time for docketing this appeal through June 23, 1983. Appendix LL.

IV
THE QUESTIONS ARE SUBSTANTIAL

A. Federal Law Requires that the Arbitration Award Be Given Preclusive Effect in the Subsequent Section 132a Proceedings.

Federal law favors the settlement of industrial disputes through final and binding arbitration. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *see* 29 U.S.C. § 173(d). It is equally axiomatic that, as to enforcement of a collectively bargained arbitration agreement, federal law governs over inconsistent state law. *E.g., Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Despite these uncontroversial principles, courts disagree about the effect of an award rendered pursuant to such an arbitration agreement. Two related questions arise here: (1) Does federal law or state law govern the preclusive effect of an arbitration award in subsequent litigation? and (2) What collateral estoppel effect does such an award have?

1. *Federal or State Law*. Doubt exists whether it is federal or state law which governs the preclusive effect of a labor arbitration award in subsequent judicial proceedings. *See, e.g., Ivery v. United States*, 686 F.2d 410, 413 (6th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3684 (1983). Indeed, it is not always apparent what law governs the preclusive effect of federal judgments. *See generally* Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976).

This Court has suggested that an arbitration award is potentially preclusive without identifying the source of law that would make it so. *E.g., United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 & n.18 (1966). In recent decisions, however, the Court seems to assume that federal law controls. In *Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974), and *Barrentine v. Arkansas-Best Freight Systems, Inc.*, 450 U.S. 728 (1981), the Court evaluated the extent to which arbitration decisions would preclude relitigation of federal statutory issues in federal court by reconciling competing "aspects of national labor policy". *Barrentine, supra*, at 734; *see Gardner-Denver, supra*, at 45-47. Thus, this Court's approach in *Gardner-Denver* and *Barrentine* strongly suggests that it is the important federal policies that have shaped labor arbitration in this country — arbitral finality and industrial peace — which should determine the preclusive effect of a labor arbitration award in subsequent litigation.

Had the Court made this point explicit, this appeal might well have been unnecessary. From all appearances, the tribunals below did not believe that federal law governed the collateral estoppel issue. Certainly they did not apply federal law: federal law does not, for example, allow rejection of the collateral estoppel defense merely because the grievant was not formally a party to the arbitration, yet that is precisely the position taken by the Appeals Board below. *Compare* Appendix DD at 399-400 *with, e.g., Vaca v. Sipes*, 386 U.S. 171 (1967); *see Montana v. United States, supra*.

2. *Collateral Estoppel.* This Court has repeatedly extolled the policies underlying collateral estoppel and res judicata. *E.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401-402 (1981); *Montana v. United States, supra*, 440 U.S. at 153-55; *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322, 326-33 (1979). The Court has championed these policies against limitations on the preclusion doctrines which were justifiable historically but not

functionally. *E.g., Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971).[18]

Fair application of collateral estoppel and res judicata promotes not only the efficient allocation of the resources of courts and litigants, but procedural due process as well. Due process obligations in connection with these preclusion doctrines are, of course, imposed on the States by the Fourteenth Amendment to the United States Constitution. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940).

Do these policies, coupled with the federal policies favoring arbitral finality and the peaceful resolution of labor disputes, *see, e.g., Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel v. Maddox*, 379 U.S. 650 (1965), require that issues resolved in a labor arbitration not be relitigated in a state court? Possibly precedent does not demand this, but reason and fairness do.

It is instructive that, even without considering the strong federal policy favoring the finality of labor arbitration awards, some authorities have recognized that collateral estoppel normally should apply to factual issues determined in procedurally fair arbitrations. *E.g.*, Restatement (Second) of Judgments § 84(3).[19] As the Restatement's Commentators observe, "[w]hen arbitration affords opportunity for presentation of evidence and argument substantially similar in

---

[18]*Blonder-Tongue* freed collateral estoppel from the traditional mutuality principle. The Court observed that, "[i]n any lawsuit where a defendant . . . is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources." *Id.* at 329.

[19]That subsection of the Restatement (Second) of Judgments provides:

> A determination of an issue in arbitration does not preclude relitigation of that issue if:
>
> (a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
>
> (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has." *Id.* at Comment c. When federal labor policy is factored in, therefore, it seems inevitable that labor arbitration awards would have collateral estoppel effect.

But although some federal courts have recognized the force of this position, *e.g., Becton v. Detroit Terminal of Consolidated Freightways,* 490 F.Supp. 464 (E.D. Mich. 1980), *modified,* 687 F.2d 140 (6th Cir. 1982), others have avoided ruling on the issue, *e.g., American Postal Workers v. United States Postal Service,* 682 F.2d 1280, 1283 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3611 (1983), and still others, like the California tribunals below, have denied collateral estoppel effect, *e.g., Peabody Galion v. Dollar,* 666 F.2d 1309, 1320-21 (10th Cir. 1981).

Appellant submits that this lack of unanimity arises from lower courts' uncertainties about the thrust of this Court's decisions in *Gardner-Denver, supra,* and *Barrentine, supra.* In *Gardner-Denver,* the Court held that an arbitration decision sustaining a discharge against an employee's claim of racial discrimination did not preclude an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Based on the legislative history of that statute, this Court concluded that Congress intended employees to have a right to a trial de novo in federal court notwithstanding the federal policy favoring arbitration. *See* 415 U.S. at 46 n.6. The Court rejected the defense of collateral estoppel, *see id.* at 49 n.10, and indicated that an arbitration award could, at best, constitute weighty evidence in a Title VII action, *id.* at 60 n.21. Similarly, this Court held in *Barrentine* that an arbitration decision on a wage claim did not bar a lawsuit on that claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. Looking again to congressional intent, the Court resolved the "tension" between the "[t]wo aspects of national labor policy" against the finality of the arbitration award. *See* 450 U.S. at 734,

745.

Thus, in both *Gardner-Denver* and *Barrentine*, the Court chose between conflicting federal labor policies. Appellant believes those cases should not, therefore, be taken to undermine the finality of arbitration decisions with respect to claims and issues later raised under *state* law. But some courts, such as the Tenth Circuit Court of Appeals in *Peabody Galion v. Dollar, supra*, disagree.

The *Peabody Galion* court, reaching the same result as the California tribunals below, ruled that federal law now condones relitigation in state court of issues determined in an arbitration under a collective bargaining agreement. The Tenth Circuit specifically held that, under *Gardner-Denver* and *Barrentine*, a state statute could overthrow an arbitration award as completely as a federal statute. 666 F.2d at 1321.[20]

---

[20]In the words of the Tenth Circuit Court of Appeals:

> In the instant case it is true that the independent remedy arises under state law rather than federal. We hold, however, that that does not constitute a distinguishing factor.

Id.

Appellant admits that some of this Court's remarks in *Gardner-Denver* and *Barrentine* arguably do support a general retreat from arbitral finality. In *Gardner-Denver*, for example, the Court said:

> The distinctly separate nature of . . . contractual and statutory rights is not violated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

415 U.S. at 50. And:

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.

Id. at 57-58. In *Barrentine*, similarly:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different con-

(footnote continued on following page)

Appellant respectfully submits that the case at bar presents a welcome opportunity for this Court to explain that the *Gardner-Denver* and *Barrentine* exceptions to arbitral finality are based on — and limited to — competition between *federal* labor policies. The States, California included, should defer to the federal policies favoring the peaceful resolution of industrial disputes through collectively bargained arbitration procedures. Because this Court has not yet explicitly held that factual issues determined in procedurally fair arbitrations are collateral estoppel in subsequent state litigation, Appellant believes plenary consideration of this case is appropriate.

B. Preemption to Prevent State-Law Nullification of the Results of Collective Bargaining.

Federal law precludes the application of state law to give to one party that which was bid for, but lost, in the collective bargaining process. *Teamsters Local 24 v. Oliver*, 358 U.S. 283, 296 (1959); *see Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260 (1964). This rule should invalidate California Labor Code Section 132a as it was applied below.

Appellee challenged her discharge under the collectively bargained arbitration procedure. The arbitrator rejected her grievance on the ground that her continued employment would present an undue safety risk. Under federal law, the effect of that arbitration decision is exactly the same as if

---

siderations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

450 U.S. at 737. In a similar vein, perhaps this Court spoke in unnecessarily broad terms when, in *Kremer v. Chemical Construction Corp.*, 72 L.Ed.2d 262 (1982), it stated that "[a]rbitration decisions, of course, are not subject to the mandate of [28 U.S.C.] § 1738." *Id.* at 278. In light of the doubt cast on arbitral finality by *Gardner-Denver* and *Barrentine*, the *Kremer* dicta that an arbitration award is not entitled to statutory full faith and credit is disturbing.

Appellant and the Union had bargained over, and ultimately agreed on, a contractual clause permitting Appellant to discharge any employee whose continued employment appeared to present an undue safety risk. *E.g.*, *United Steelworkers v. Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 581.[21]

California Labor Code Section 132a should not be permitted to frustrate that collectively bargained solution to an industrial dispute. *Teamsters Local 24 v. Oliver*, *supra*; *cf. Local 926, International Union of Operating Engineers v. Jones*, 51 U.S.L.W. 4343, 4347 (1983) (National Labor Relations Act preempts state law where the factual issues underlying federal and state proceedings are substantially the same). But the decision of the Appeals Board below did exactly that, *see* Appendix DD, and the California Court of Appeal and Supreme Court concurred in silence.

California thereby ruled on this federal issue in a way which directly conflicts with the decisions of the Hawaii court in *Gouveia v. Napili-Kai Ltd.*, 97 Lab. Cases (CCH) ¶ 10,005 (Hawaii 1982),[22] and the Texas court in *Thompson*

---

[21] [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

Id. Cf. General Drivers Local 89 v. Riss & Co., 372 U.S. 517, 519 (1963) ("the policy of the Labor Act can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play").

[22] In *Gouveia*, the Hawaii Supreme Court dismissed a state-law emotional distress claim based on a discharge that had been upheld in arbitration. The state claim was not based on a workers' compensation statute, however, so *Gouveia* is in somewhat less direct conflict with California than the Texas case. Oklahoma, *see Peabody Galion v. Dollar*, *supra*, 666 F.2d at 1313-19, and Oregon, *see Vaughn v. Pacific Northwest Bell Telephone Co.*, 611 P.2d 281, 286-87 (Oregon 1980), may agree with California and disagree with Hawaii and Texas.

v. Monsanto Company, 559 S.W.2d 873 (Tex. Civ. App. 1977).

The facts in *Thompson* closely parallel those of this case. An employer discharged an employee who had recovered workers' compensation benefits. The employee grieved the discharge, claiming he had been terminated for reasons connected with the workers' compensation claim. The arbitrator ruled for the employer because the employee's physical disabilities indicated that he could not perform his job safely. The employee then sued under a Texas antidiscrimination statute, alleging that he was fired because he had pursued a workers' compensation claim.[23] The *Thompson* court held that, because of the arbitration award, federal law preempted the state statute. 559 S.W.2d at 876-77. The Texas Supreme Court subsequently approved the *Thompson* rule.[24]

Appellant submits that this split of authority on an important federal issue justifies this Court's plenary consideration. *Cf.* Supreme Court Rule 17.1(b) (certiorari may be appropriate "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeal").

---

[23]Section 1 of the Texas statute, substantially the same as subsection 1 of California Labor Code Section 132a, read:

> No person may discharge or in any other manner discriminate against an employee beause the employee has in good faith filed a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Texas Revised Civil Statutes, Article 8307c, Section 1 (quoted in *Thompson, supra*, 559 S.W.2d at 874).

[24]In *Spainhouer v. Western Electric Company, Inc.*, 615 S.W.2d 190 (Texas 1981), the Supreme Court of Texas explained that the *Thompson* rule applied wherever "the employee had pursued his rights under the collective bargaining agreement to final arbitration". *Id.* at 191. The Texas Court also cautioned that, where "the grievance procedure under the collective bargaining agreement had broken off at an early stage and there was no arbitration", the state action would not be preempted. *Id.* Because Appellee in the case at bar did pursue her grievance to arbitration, of course, this clarification does not ameliorate the conflict between California and Texas.

C. Preemption by the National Labor Relations Act.

Conduct that the National Labor Relations Act arguably prohibits or protects generally is not subject to regulation by state laws, and a state statute that attempts to regulate such conduct is preempted by federal law. *Local 926, International Union of Operating Engineers v. Jones, supra*; *San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245-46 (1959). This preemption rule invalidates California Labor Code Section 132a as applied below because, in a spate of recent decisions, the National Labor Relations Board has suggested that conduct such as Appellant's discharge of Appellee is encompassed by the National Labor Relations Act. *See Farrens Tree Surgeons, Inc.*, 264 N.L.R.B. No. 90 (1982); *Grumman Flexible Corporation*, 264 N.L.R.B. No. 34 (1982); *Ohio Brass Company*, 261 N.L.R.B. No. 18 (1982).

The NLRB in *Ohio Brass* indicated that employment decisions adverse to employees which are made by employers on the basis of events related to workers' compensation claims could, depending on the facts, be either protected or prohibited by the Act. On the facts before it in *Ohio Brass*, the NLRB ruled it lawful for an employer to ask a job applicant about past industrial injuries he or she had suffered. But, reviving *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980), the NLRB also reaffirmed that Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), would be violated if an employer discharged an employee because of an expressed intention to file a workers' compensation claim. *Ohio Brass, supra*, slip op. at 7 & 8 n.8.

Appellant's discharge of Appellee surely falls within either the protections or the prohibitions of the Act as recently interpreted by the NLRB in *Ohio Brass*. The Board suggested that the Act affirmatively protects personnel actions designed to keep the workplace safe:

> Respondent is entitled to be aware of any possible physical limitations of prospective employees to determine whether it is advisable to hire them, and, if they are hired, to avoid placing them in situations potentially dangerous to themselves and their fellow workers.

Id., slip op. at 6. The arbitrator, the Workers' Compensation Judge, the Appeals Board, and the courts below all agreed that Appellee was discharged for exactly this kind of reason; Appellant's conduct must, therefore, be at least *arguably* protected by the Act.

Moreover, on a slightly different view of the facts, the National Labor Relations Act arguably prohibits Appellant's conduct. The NLRB in *Ohio Brass* disinterred the rule of *Krispy Kreme, supra,* even though that decision had been denied enforcement by the United States Court of Appeals for the Fourth Circuit.[25] If California is right to characterize Appellant's discharge of Appellee as retaliatory despite the absence of discriminatory motive, then the discharge may violate the National Labor Relations Act as well.

Appellant stresses that, for the preemption doctrine to apply, conduct need only be *arguably* protected or prohibited. Appellant's conduct is both. Accordingly, the California courts had no jurisdiction of the case.

Appellant submits that this Court should give plenary consideration to the contention that the National Labor Relations Act preempts Section 132a as applied below because a conflict exists among the federal courts of appeals, the National Labor Relations Board, and the California tribunals below as to whether conduct such as Appellant's is covered by the Act.

---

[25]Thus, the NLRB and at least one court of appeals disagree about whether a retaliatory discharge in connection with workers' compensation claims violates the National Labor Relations Act. The Tenth Circuit appears to agree with the Fourth Circuit and disagree with the NLRB, but has not fully explored the issue. *See Peabody Galion v. Dollar, supra,* 666 F.2d at 1319.

D. The California Supreme Court Violated Appellant's Right to Due Process.

Essential to the fair administration of the judicial system is that every litigant have reasonable notice and an opportunity to be heard. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976); *Lambert v. California*, 355 U.S. 225, 228 (1957); *Twining v. New Jersey*, 211 U.S. 78 (1908). Although the States are not "required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must . . . be applied with an even hand." *Rinaldi v. Yeager*, 384 U.S. 305, 310-311 (1966).

The California Supreme Court violated these principles of fundamental fairness when, in December 1981, it reversed the decision of the Court of Appeal without permitting Appellant to oppose the appeal. *See* note 12, *supra*. The California Supreme Court's decision was the turning point of the case: the Court of Appeal obeyed the Supreme Court's explicit mandate to review the Appeals Board's decision favoring Appellant, and then complied with the directive implicit in the Supreme Court's citation to *Western Electric Company v. Workers' Compensation Appeals Board, supra*, by reversing the Appeals Board.[26]

Since then, the California courts have simply refused to exercise their discretionary jurisdiction to consider any of Appellant's contentions. Appellant believes this entire course of events is fundamentally unfair and merits this Court's attention.

---

[26]Although the Supreme Court's order on its face simply ordered review of the Appeals Board's decision, *see* Appendix OO, it operated as decision on the merits. The Appeals Board had ruled that, under *Western Electric*, Section 132a is not violated without a discriminatory motive. The Appeals Board thereby rejected Judge Butler's interpretation of *Western Electric*. *See* Appendix N. When the California Supreme Court ordered the Court of Appeal to review the Appeals Board's decision *in light of Western Electric*, therefore, it was plain what result the Supreme Court expected.

V.
CONCLUSION.

At the heart of this case lies California's refusal to defer to federal labor laws. Appellant humbly asks this Court to resolve the conflicts — among courts, among principles, among jurisdictions — on the substantial federal questions at issue in this appeal.

Dated: June 23, 1983.

Respectfully submitted,

GEORGE J. TICHY, II, ESQ.
MICHAEL B. MARGOLIS, ESQ.
LITTLER, MENDELSON, FASTIFF
& TICHY
A Professional Corporation
Attorneys for Appellant

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1983